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No. 92-8579

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R.D. HOLLOWAY, *et al.*,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In reviewing whether an action against government officials for deprivation of constitutional or statutory rights is precluded by qualified immunity because the rights allegedly violated were not clearly established at the time of the conduct, are appellate courts required to disregard relevant legal authorities if the those authorities were neither identified by the plaintiff nor discovered by the district court?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Beverly S. Elder, the common law wife of petitioner, was also a plaintiff and appellant in the proceedings below. *See* Joint Appendix ("JA") at 2-3.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Idaho is reprinted at JA 2-22 and reported at 751 F. Supp. 858. The December 19, 1991 opinion of the United States Court of Appeals for the Ninth Circuit is set forth at JA 24-30 and published at 951 F.2d 1112. That opinion was amended on September 17, 1991, and the amended opinion is set forth at JA 31-45 and reported at 975 F.2d 1388.

JURISDICTION

Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* were denied on January 27, 1993. JA 46. Petitioner filed a petition for a writ of certiorari with this Court on April 19, 1993, which was granted on June 28,

1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a civil rights action alleging that the arrest of petitioner Charles K. Elder at his home without a warrant violated the Fourth Amendment. The district court ruled that plaintiff's claims against the arresting officers were barred by qualified immunity because it was not clearly established at the time of the arrest that the circumstances under which petitioner was arrested required a warrant. In so doing, the district court was not aware of a Ninth Circuit case decided a year before the arrest which directly addressed the issue and concluded that, absent exigent circumstances, a warrantless arrest under circumstances similar to those presented here violated the Fourth Amendment. On appeal, the Ninth Circuit affirmed on the basis that this prior case must be ignored on appeal because it was not cited by the plaintiff in the district court. The Ninth Circuit established a new rule that appellate courts must affirm district court decisions denying relief under 42 U.S.C. § 1983 based on

the conclusion that the law was not clearly established at the time of the alleged misconduct, even if the decision is contrary to its own (and other) legal authorities, if those authorities were not cited in the district court.

A. The Arrest and District Court Proceedings

On April 27, 1987, officers from the County of Ada, Idaho, who had been informed that petitioner Charles Elder was wanted by Florida authorities, sought to arrest him without first obtaining an arrest warrant. The officers first tried to arrest Mr. Elder at his place of work but, when they arrived, found that he had gone home. The officers then went to the home where petitioner, his brother, William Elder, and William Elder's family lived. The Ada County officers and sheriff established roadblocks around the house and surrounded it with several armed officers. When petitioner's brother left the house, he was detained by the officers. The officers then used a telephone and police loudspeaker to contact petitioner and urged him to surrender. When they did so, Mr. Elder suffered two epileptic seizures. After petitioner recovered from the second seizure, the officers instructed him that, if he could not walk, he should crawl out of the house. But when petitioner walked through the doorway and onto the porch of the house, he suffered a third seizure and fell face down, hitting his head on the concrete walk. Because of the fall, petitioner sustained severe brain damage that has left him partially paralyzed. JA 2-5, 32-33.

Petitioner brought this action under 42 U.S.C. § 1983, alleging principally that the Ada County sheriff and arresting officers violated his constitutional rights under the Fourth Amendment by arresting him at his home without a warrant. On motions for summary judgment, the district court found that this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980), clearly established that, absent consent or exigent circumstances, arresting an individual at a private residence without an arrest warrant violates the Fourth Amendment.

JA 11-12. Respondents argued that the arrest was lawful under this standard because petitioner left the house voluntarily and the arrest was justified by exigent circumstances, but the district court found that disputed issues of material fact precluded resolving either of these arguments on the summary judgment record. *See* JA 15-16.

The district court concluded, however, that the officers were shielded from liability by the doctrine of qualified immunity recognized by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), because the constitutional rights at issue were not "clearly established" at the time of the arrest. The court said that it "found no controlling Idaho or Ninth Circuit case law" addressing whether an arrest that is effected by officers surrounding a house and requesting that the individual inside surrender constitutes an arrest at the house that requires a warrant. JA 12, 18.

In fact, the Ninth Circuit had addressed this precise issue a year before petitioner was arrested in *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir.), *cert. denied*, 476 U.S. 1144 (1986). In that case, arresting officers had surrounded a suspect's trailer with guns drawn, ordered the suspect to come outside, and arrested him when he did so. The Ninth Court ruled that this constituted an arrest at the home for which a warrant is required absent consent or exigent circumstances: "since appellee was in his trailer at the time he was surrounded by armed officers, and since he did not voluntarily expose himself to their view or control outside his trailer but only emerged under circumstances of extreme coercion, the arrest occurred while he was still inside his trailer." *Id.* at 893. In reaching this conclusion, the Ninth Circuit endorsed the reasoning of *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985), in which the Sixth Circuit reached the same conclusion where officers surrounded a suspect's house and used a bullhorn to order him to exit. The Ninth Circuit also relied upon its prior decision in *United States v. Johnson*,

626 F.2d 753 (9th Cir. 1980), *aff'd on other grounds*, 457 U.S. 537 (1982), in which it had stated that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home," and that arresting officers should not be permitted to "avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the 'reach' of the arresting officers." *Id.* at 757.[1]

The *Al-Azzawy* decision, however, was not cited by any of the parties, and the district court was apparently unaware of it.

B. The Ninth Circuit's Decision

Petitioner appealed solely on the qualified immunity issue, and the Ninth Circuit affirmed in an opinion issued on December 19, 1991. JA 24-31. On September 17, 1992, the panel *sua sponte* issued an amended opinion reaching the same result. JA 31-45.

The Ninth Circuit's initial opinion acknowledged that the *Al-Azzawy* decision "is closely on point and could make a difference in the outcome of this case" because it "clearly established" the principle that "'"it is the location of the arrested person, not the arresting agents, that determines whether an arrest occurs within a home."'" JA 26-27 (quoting *Al-Azzawy*, 784 F.2d at 893, quoting *United States v. Johnson*, 626 F.2d at 757); *see also* JA 29 (decision below is "arguably erroneous" in light of *Al-Azzawy*). The

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[1] Like the Ninth and the Sixth Circuits, other circuits have concluded that, absent exigent circumstances, an arrest effected by surrounding a suspect at a residence requires a warrant. *See United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986). In *Al-Azzawy*, the Ninth Circuit ultimately concluded that the warrantless arrest at the home in that particular case was justified by exigent circumstances. 784 F.2d at 894.

amended opinion similarly observed "that *Al-Azzawy*'s initial conclusion might have alerted a reasonable officer to the constitutional implications of putting a suspect under arrest after he had come outside his house pursuant to an order to exit." JA 35.

Nonetheless, the Ninth Circuit held that it must disregard *Al-Azzawy* on appeal because it had not been cited to, nor discovered by, the district court. It acknowledged that "normally, a district court has to get an issue of law right, and it does not matter which party presents which authorities (or whether the court uncovers them itself)." JA 40. But the court announced a special rule for review of whether civil rights claims are barred by qualified immunity. In reviewing a district court decision denying relief under Section 1983 on the grounds that the rights at issue were not clearly established at the time of the incident, the Ninth Circuit held, an appellate court shall consider only those legal authorities identified by the plaintiff, and those, if any, independently identified by the district court's research. JA 39, 43-45.

The court offered two reasons for this unique restriction on appellate review, known as "the Elder rule." JA 66, 69. First, it concluded that this Court's statement in *Davis v. Scherer*, 468 U.S. 183, 197 (1984), that the plaintiff may overcome an official's qualified immunity "only by showing" that the constitutional rights allegedly violated "were clearly established at the time of the conduct at issue," mandates that the plaintiff must identify all legal authority on the issue as part of the plaintiff's "burden of proof." JA 36-39. Second, it stated that, although the issue of whether constitutional rights are clearly established is a legal question, it should be subject to restrictions that are analogous to the restrictions on appellate treatment of fact issues because it represents a determination of "legal facts." JA 39-40 (amended opinion); *see also* JA 27 (initial opinion) (issue is "akin to a question of fact"). Just as review of factual issues is limited to evidence in the record, the court concluded, appellate review

of whether a constitutional right is clearly established should be limited to the authorities cited in the record. JA 41-43 (amended opinion), and JA 27-29 (initial opinion).

Petitioner's request for rehearing was denied, and his suggestion for rehearing *en banc* was rejected over the dissent of five judges. The dissenting opinions, written by Judges Kozinski and Reinhardt, criticized the panel for creating a "totally new legal doctrine" that mandates that, even on a pure question of law, a court of appeals "must ignore its own (and the Supreme Court's) controlling case law if it was not cited to the court below." JA 47, 64. The dissenting judges argued that treating the legal issue in qualified immunity as a "legal fact" which is dependent upon the authorities cited in the district court record is contrary to longstanding principles recognizing that appellate courts have an obligation to make an "an independent assessment of what the law is." JA 48-50. "The [appellate] court's job," Judge Kozinski observed, "is to determine the rights of the parties, not to grade motion papers." JA 57.

Judge Kozinski's dissent also observed that the Elder rule is contrary to the qualified immunity decisions of this Court. The single sentence the panel relied upon in *Davis v. Scherer*, *supra*, was directed at a wholly different issue and could not reasonably be construed to mandate the "watershed" change in the treatment of legal issues called for by the panel's decision. JA 52-54. Judge Kozinski also pointed out that the Elder rule is not consistent with the rationale behind the objective test for qualified immunity adopted in *Harlow v. Fitzgerald*, *supra*, which directs that "the official's conduct be judged against an objective standard -- the law as it actually was, not as the official thought it was, or as the plaintiff proves it to be." JA 53.

Finally, both Judge Kozinski and Judge Reinhardt noted that the Elder rule would unjustly deny civil rights claimants recovery for violations of clearly established rights. Under the rule, only in civil rights cases "can failure to cite a

particular decision render a federal appellate court powerless to provide a remedy for a blatantly unconstitutional act." JA 66. Moreover, there was no countervailing justification for the rule. As Judge Kozinski put it, "[t]he panel's rule does nothing at all to help government officials discharge their responsibilities; its only effect is to diminish the rights of aggrieved plaintiffs." JA 63.

SUMMARY OF ARGUMENT

The decision below establishes a "novel rule [that] will serve no one well," JA 60, while distorting the appellate process and the doctrine of qualified immunity in a way that can only lead to injustice. Two considerations show that the Ninth Circuit's restriction of appellate review of qualified immunity decisions must be rejected.

First, the decision is inconsistent with the obligation of appellate courts to determine legal issues independently, based on *all* relevant authorities, and not simply those cited to the district court. The issue of whether law is "clearly established" for purposes of assessing qualified immunity claims is a purely legal issue that the decision below improperly treats as a factual issue. Departures from the principle of independent appellate review of legal issues are rare and limited because, as this Court emphasized in *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), appellate courts are, as an institutional matter, better suited to accurately resolve legal issues, and independent review fosters coherence and uniformity in the development of the law. The decision below, by preventing appellate courts from correcting legal errors, prohibits them from performing the very function they are designed to serve. Forfeiture and waiver rules that exist in other contexts have never been applied to legal authorities because neither the failure of counsel to cite a particular authority, nor the fortuity of the district court's legal research, should bar an appellate court from determining and applying the correct legal rule.

Second, the decision below departs from the objective standard for qualified immunity in a way that is incompatible with the rationale behind the standard. This Court's decision in *Harlow v. Fitzgerald*, *supra*, established an objective test that balances the need to protect the legitimate exercise of official discretion and the equally important mandate to deter, and provide a remedy for, official misconduct that violates clearly established federal rights. The decision below disturbs this balance by imposing a restriction on appellate review that serves neither of these interests and denies relief in an unpredictable and arbitrary manner. The only support from this Court's qualified immunity decisions cited to justify the decision below, a single sentence from *Davis v. Scherer*, *supra*, provides no support for the novel rule adopted by the Ninth Circuit. Most importantly, by disrupting the balance struck by the objective test for qualified immunity, the decision below requires courts to knowingly and needlessly condone unfair results. The Elder rule thus deprives victims of civil rights violations the statutory remedy provided by Congress, unjustly burdens civil rights plaintiffs, and violates basic tenets of fairness by denying meritorious civil rights claims the benefit of governing law based solely on the failure of their counsel to cite particular legal authorities in the district court.

ARGUMENT

I.
WHETHER A FEDERAL RIGHT IS CLEARLY ESTABLISHED IS A LEGAL ISSUE THAT, LIKE OTHER LEGAL ISSUES, MUST BE DECIDED BASED ON THE CONTROLLING LAW AND NOT SOLELY ON THE AUTHORITIES CITED IN THE TRIAL COURT.

The fundamental error in the decision below is that it requires that appellate courts decide purely legal issues by

disregarding controlling legal authorities -- including their own precedents -- and affirm district court decisions that they know to be wrong. This anomalous rule is contrary to basic principles concerning the distinction between legal and factual issues, and the role of appellate courts in deciding questions of law. This Court has long recognized that the role of appellate courts is to resolve purely legal questions based on their independent judgment, and not simply to select among the interpretations of the law offered by the parties or the district court. The failure of the parties or the district court to cite relevant legal authorities does not diminish or alter this obligation. The decision below should be reversed because it ignores this fundamental doctrine, and the institutional considerations upon which it is based.

A. The Issue Of Whether Qualified Immunity Is Unavailable Because A Constitutional Or Statutory Right Is Clearly Established Is A Question Of Law.

This Court's decisions make clear and, indeed, have frequently emphasized, that the objective test for qualified immunity claims established in *Harlow v. Fitzgerald*, *supra*, presents a pure question of law. In *Harlow* itself, the Court declared that the legal test was designed so that "the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." 457 U.S. at 818. In *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), this Court held that an interlocutory appeal from a denial of a qualified immunity claim was permitted, in part, because there is no need for the appellate court to resolve any factual issues; "[a]ll [the appellate court] need determine is a question of law." "We emphasize at this point," the Court stated, "that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Id.* at 528 n.9. Two years ago, in *Siegert v. Gilley*, 111 S. Ct.

1789, 1793 (1991), this Court once again declared that the issue of whether the applicable law is "clearly established" is a "purely legal question."

The Ninth Circuit's conclusion that appellate review of this legal issue is distinguishable from all other legal issues and should be treated like a factual issue because it "requires consideration of legal facts," JA 39, is without precedent or foundation. Appellate review of legal issues always involves examination of existing legal authorities -- or "legal facts" in the parlance of the Ninth Circuit -- to determine whether the law is already "clearly established." For example, where a statute is involved, courts must start by deciding whether the plain language of a statute is determinative. *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993). Where interpretation of a legal rule is at issue, courts must first examine whether past decisions have settled the interpretive issue as a matter of *stare decisis*. *Lechmere, Inc. v. National Labor Relations Board*, 112 S. Ct. 841, 847-48 (1992). Even where the application of a judicially-created doctrine is at issue, courts must begin by determining whether a case is "clearly controlled by existing precedent." *See United States v. Johnson*, 457 U.S. 537, 548 (1982). The fact that the legal issue in qualified immunity cases requires an examination of the legal authorities to determine if the law was clearly established at the time of the conduct certainly does not make qualified immunity unique.

Nonetheless, the Ninth Circuit concluded that restricting appellate review of the legal issue in qualified immunity cases is warranted because the question of whether the law was "clearly established" (1) restricts the examination of legal authorities to a particular time; and (2) does not require adjudication of the right at issue, only whether it was already clearly established. *See* JA 40-41. There is no dispute that the objective standard established in *Harlow v. Fitzgerald* has these characteristics. But neither of these characteristics is unique to the *Harlow* standard, and, more

importantly, neither justifies restricting appellate review to the authorities cited below.

First, the fact that the qualified immunity test requires the court to "determine what the state of the law was at the point of time in the past when the incident occurred," JA 40, does not warrant treating the issue differently from other legal issues. Many legal standards are framed in such a way that they require a determination of whether past legal authorities established rights that should be protected, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010-13 (1984), or established a particular rule. *Teague v. Lane*, 489 U.S. 288, 310 (1989); *see also Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (requiring consideration of whether prior decisions clearly foreshadowed a particular result). The retrospective focus of such standards does not make such issues any less a question of law.

Moreover, an inquiry into whether the law is clearly established by current authorities, and an historical inquiry into whether it was clearly established by the authorities as of a certain date, are analytically the same. Both inquiries are governed by the principles that control the construction of legal authorities, not by the rules of evidence for factual determinations. For example, a court determining whether the law is clearly established must examine the language of prior decisions, look for conflicts among courts that indicate uncertainty, and determine the effect of statutes. *See Mitchell v. Forsyth*, 472 U.S. at 532-35 & n.12. In doing so, the court must apply the same canons that apply in construing cases and statutes to resolve any other legal issue. Resolving whether a body of legal authorities clearly establish the law, even when the authorities are dated, is still an "essentially legal question." *Id.* at 526.

Second, the fact that *Harlow* requires a court to determine whether existing decisions clearly establish a particular right, as distinguished from considering whether the court itself would find that the right exists, does not warrant different

appellate treatment. This process of determining what legal rules existed, without the discretion to declare a new legal rule, is similar to that presented when state law provides the rule of decision and federal courts "must apply what they find to be the state law," *Commissioner v. Estate of Bosch*, 389 U.S. 456, 465 (1967), without altering rights established by past state court decisions. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203-05 (1956). Yet this Court has held that finding state law is a legal issue on which "*no* form of appellate deference is acceptable." *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1224 (1991) (emphasis added). There is no reason to treat the legal issue of qualified immunity, in which federal courts are called upon to "find" the federal law as of the time an action occurred, as subject to a different standard of appellate consideration.[2]

[2] The decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), is not to the contrary. There, the Court concluded that *de novo* review was not appropriate for cases under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), where the issue is whether the government's position was substantially justified on the merits because the issue is "not what the law now is, but what the Government was substantially justified in believing it to have been." *Id.* at 561. In *Pierce* the Court was concerned that "a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, second hand-fashion." *Id.* at 561. The qualified immunity standard, however, does not entail such a danger of establishing previously unestablished law because it requires a direct inquiry into the opposite question: whether the law was clearly established at the time of the conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Put simply, there is no harm at all to the legal process in stating that the law was clearly established at a particular time, as *Harlow* demands. Moreover, the decision in *Pierce* in no way precludes an appellate court evaluating the justifications for the government's conduct from

(continued...)

B. Legal Issues Are To Be Decided On Appeal Based On The Law, And Not Solely On The Legal Authorities Considered Below.

It is well established that in deciding questions of law, the courts have a special, independent obligation to strive to get the answer right. Although the burden of proving facts rests on the parties, and a court may not decide factual issues based on evidence outside the record, a court's responsibility for accurately determining the law has never been limited in this manner. Similarly, appellate courts are required to give deference to a trial court's findings of fact, but questions of law are to be determined *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984). In short, it is "the province and the duty of the judicial department is to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and neither the strategic decisions of the parties on what legal arguments they will make, the shortcomings of the litigants' presentations, nor the flaws in the lower court's research, should deter an appellate court from that duty.

The Elder rule defies these basic principles. Under the decision below, appellate review is reduced to an exercise in determining whether the district court misread the decisions cited, and errors of law are to be affirmed on appeal if authorities that set forth the correct rule were not cited by the plaintiff. The appellate court is prohibited from exercising its independent judgment. Instead, the court must treat legal authorities -- even a decision written by a member of the appellate panel -- as if they are matters of evidence and ignore them if they were not placed in the record below.

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[2](...continued)
considering its own or other relevant precedent if the precedents were not cited to the district court.

Treating legal questions like fact disputes in this manner ignores the significant differences between the role of courts in deciding each type of issue. The witnesses and evidence necessary to determine the facts are uniquely available to the parties to the dispute, whereas the sources consulted in determining legal issues are fully accessible to the court. Thus, courts have always been "bound to take judicial notice" of statutes and opinions "without plea or proof." *Lamar v. Micou*, 114 U.S. 218, 223 (1885). Moreover, in finding facts, courts act to resolve disputes that are particular to the parties and a given case. But in deciding questions of law, courts must be cognizant of the fact that "judgments are precedents" that should define the legal rules that will govern other parties and other disputes. *Young v. United States*, 315 U.S. 257, 259 (1942). Accordingly, the responsibility for accurately deciding the legal issues "cannot be left merely to the stipulation of the parties," but rests squarely with the courts. *Id.*; *Town of South Ottawa v. Perkins*, 94 U.S. 260, 267 (1877) (whether something is or is not the law "is a judicial question, to be settled and determined by the courts and judges.")

For these reasons, this Court's decisions have repeatedly rejected the suggestion that courts should be limited to the presentations made by the parties when deciding legal issues. *See, e.g., Lear v. Adkins*, 395 U.S. 653, 662 n.10 (1969); *Orloff v. Willoughby*, 345 U.S. 83, 87-88 (1953). "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991); *accord United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993). Indeed, this Court has sometimes concluded that the resolution of the legal issues presented by a case requires consideration of legal principles and authorities that were *not* relied upon by the parties. *See*

Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990). As Judge Kozinski put it, "in our system, . . . the adversaries present their versions of the law to the court and the court renders its determination after making an independent assessment of what the law is." JA 50; *see also American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 219 (1990) (Stevens, J. dissenting, joined by Brennan, Marshall, and Blackmun, JJ.) (rejecting view that "the law applicable to a particular case is the law which the parties believe in good faith to be applicable to the case").

The decision below ignores these precedents. Given that the courts have the power to consider legal issues that are not raised by the parties in order "to identify and apply the proper construction of governing law," *Kamen*, 111 S. Ct. at 1718, the courts certainly must have the authority and, indeed, the duty, to consider the legal authorities that define the "governing law," regardless of whether they are identified by the parties. The Ninth Circuit's decision to the contrary simply abdicates the responsibility of courts to decide questions of law accurately based on the applicable law.

At the appellate level, the courts' independent responsibility for deciding questions of law is embodied in the rule that appellate courts review questions of law *de novo*, a "constitutional responsibility that cannot be delegated to the trier of fact." *Bose Corp. v. Consumers Union*, 466 U.S. at 501. The anomalous restriction on appellate review imposed by the decision below not only violates this principle of independent review, but ignores the institutional considerations on which it is founded. In *Salve Regina College v. Russell*, *supra*, this Court held that courts of appeals must not give any form of deference to district court decisions determining the content of state law. Such deference is improper, the Court found, because *de novo* appellate review is rooted in two fundamental institutional considerations: the role of appellate courts in ensuring

accurate determination of legal issues and fostering doctrinal coherence in the law. *Id.* at 1221.

First, appellate courts are in a better position to correctly decide legal issues. "[T]he logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs." *Id.* Likewise, the district courts' responsibilities for reviewing evidence and deciding factual issues limit trial judges' ability to give full consideration to legal issues. *Id.*

> Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels, see 28 U.S.C. §§ 46(b) and (c), that permit reflective dialogue and collective judgment.

Id.

Second, independent appellate review of legal issues best serves the "goal of doctrinal coherence." *Id.* at 1222. Through *de novo* review, appellate courts develop and articulate consistent legal rules to govern lower courts, but restricted review invites divergent rulings among the district courts. *Id.*; *see also Bose Corp. v. Consumers' Union*, 466 U.S. at 502-03 (independent appellate review is necessary to insure correct application of actual malice standard in libel actions and its coherent development through case-by-case adjudication).

This Court's reasoning in *Salve Regina* is equally applicable to review of the legal issue presented here. The Court's observation that "logistical burdens of trial advocacy" limit trial counsel's ability to "supplement the district judge's legal research," 111 S. Ct. at 1221, is just as true in civil rights actions as it is in diversity cases. Appellate review is designed to afford the opportunity for "more comprehensive analysis than was provided for the district judge." *Id.* This objective is obviously subverted if, as the Ninth Circuit held, the appellate court must disregard any additional authorities identified by a more thorough inquiry on appeal.

The decision below also thwarts the law-declaring function of appellate review and frustrates the development and application of consistent legal rules. *Id.* at 1222. Under the Elder rule, appellate courts reviewing qualified immunity issues only determine what the law would be based on the "universe of authorities produced by the plaintiff," JA 43 -- a universe that may be different from the one in which officials who are subject to liability under the civil rights laws, and courts deciding subsequent cases, operate. Under this theory, because each determination of the legal issue depends on the "legal facts" in the record, "it has no precedential effect . . . as to a subsequent case where the record is different." JA 43. This not only ignores the institutional function of appellate courts in promoting accuracy and coherence in resolution of legal issues, but actually mandates inconsistency.[3]

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[3] The Ninth Circuit simply errs when it characterizes qualified immunity decisions as having no role in deciding "what the law is." JA 41. For example, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court decided that, prior to this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), it was not clearly established that warrantless, domestic wiretaps for national security purposes were unconstitutional. 472 U.S. at

(continued...)

C. The Failure To Cite A Legal Authority Is Not Analogous To Other Contexts Where Failure To Raise A Matter Bars Appellate Consideration.

The Ninth Circuit sought to buttress its decision by analogizing the restriction introduced by the Elder rule to other rules that bar appellate review of matters not presented below. *See* JA 41 & n.4. The analogies, however, are misplaced and provide no justification for a rule that requires appellate courts to ignore applicable precedents in civil rights cases.

Appellate courts may decline to consider legal issues that are raised for the first time on appeal. *See Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977). This is a permissive canon which leaves the decisions as to whether new issues will or will not be considered "to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2639 (1991); *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); *Weems v. United States*, 217 U.S. 349, 362 (1910). Some court rules also mandate that specific legal issues are barred unless presented to the district court. Thus, under Fed. R. Civ. Proc. 51, objections to jury instructions are forfeited unless the grounds for the objection were raised before the charge to the jury. Fed. R. Civ. Proc. 12(h) provides that certain procedural defenses -- personal jurisdiction, venue, insufficiency of

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530-31. This decision unquestionably determined this issue, on which the appellate courts had previously disagreed, *id.* at 519, *as a matter of law*, and any pending or subsequent cases presenting the issue were bound by this precedent -- as with any other legal issue. Such decisions on qualified immunity, no less than any other decisions, declare "what the law is" and should be decided in the same way as other questions of law.

process or service of process -- are waived unless included in a motion or responsive pleading.

Both the general canon and the specific court rules, however, are very different from the Elder rule. First, both the canon and the court rules apply only to new legal *issues*, not to new legal *authorities*. Indeed, they do not even apply to new arguments that are fairly embraced within the issues raised below. *Cf. Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below" but cannot raise an entirely new question); Sup. Ct. R. 14.1(a) (questions presented are "deemed to comprise every subsidiary question fairly included therein.") Because one of the functions of appellate review is to provide comprehensive analysis of the legal issues, courts have not only permitted, but expected, parties and the appellate court itself to refine and expand both the legal argument and the authorities considered on appeal. *Salve Regina*, 111 S. Ct. at 1217; *Lear v. Adkins*, 395 U.S. at 662 n.10 (court has "the duty to consider the broader implications of" the legal contentions presented, even if this requires going beyond the arguments advanced below).

Second, both the canon and court rules are, at least in part, rooted in a concern that parties should not be permitted to "sandbag" and spring a new issue in the late stages of a case that will require retrial or unfairly prejudice an opposing party. If Rules 51 and 12(h) did not exist, there would be a strategic advantage in *not* raising jury instruction errors and personal jurisdiction defects until the end of the litigation so that a party disappointed in the outcome could obtain a retrial or escape an unfavorable judgment. *See Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2647 (1991) (Scalia, J., concurring in part) (forfeiture rules are designed to prevent strategic sandbagging). The general principle that appellate courts may decline to consider new arguments also reflects a concern that allowing a party to

introduce a new issue may "unfairly deprive [an opposing party] of adequate opportunity to respond." *Giordenello v. United States*, 357 U.S. 480, 488 (1958); *see also Hormel v. Helvering*, 312 U.S. at 556 (new issues are generally not considered on appeal so litigants are "not surprised on appeal by a final decision there of issues upon which they have had no opportunity to introduce evidence.")

No such justification exists for the Elder rule. There is no incentive for a plaintiff opposing a claim of qualified immunity to withhold helpful precedent until the appeal. The unfairness to the opposing party that may result from entertaining a new *issue* that changes the focus of a case is also very different from considering additional legal *authority* that helps resolve a legal issue that has already been joined. Moreover, while erroneous jury instructions or personal jurisdiction defects may mandate repetition of an entire trial, qualified immunity determinations are subject to immediate appellate review so that appellate courts can correct errors by the district courts before trial. *Mitchell v. Forsyth*, 472 U.S. at 530.

Third, the court rules cited by the Ninth Circuit only serve to underscore that the Elder rule is an anomalous exception to the general rule that appellate courts review legal issues *de novo* and may even consider new issues. The fact that these exceptions to court rules are limited to particular circumstances demonstrates that additional exceptions should not be created by judicial interpretation. *Cf. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (Rules 8 and 9(b) indicate that any heightened pleading requirement for civil rights actions must be introduced by amendment, not by interpretation); *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) (courts "do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.")

The Ninth Circuit also sought to justify the Elder rule by analogy to the principle that appellate courts "never consider *facts* not presented to the district court," including facts omitted from the summary judgment record. JA 41 n.4 (emphasis in original). This analogy fails, however, because, as discussed above, that principle arises out of the "respective institutional advantages of trial and appellate courts." *Salve Regina*, 111 S. Ct. at 1222. In addition, fairness to the parties requires that, because factual matters must be joined by marshalling testimony and exhibits that are peculiarly within the province of the parties, and are subject to response and rebuttal, facts must be presented before the record is closed in the district court. *Id.* But legal authorities are not subject to cross-examination or impeachment. A critical difference between legal and factual issues is that "[t]here can be no estoppel in the way of ascertaining the existence of a law." *Town of South Ottawa v. Perkins*, 94 U.S. at 267. The overriding mandate is that the court resolve the legal issue based on "the truth of the fact . . . and not according to the shifting circumstances of the parties." *Id.* The Ninth Circuit's directive that appellate courts restrict review of qualified immunity cases to the authorities cited below, even when it leads to unjust results, must be reversed because it neglects the fundamental axiom that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. at 557.

II.
THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS ON QUALIFIED IMMUNITY.

"[T]his Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court," and has insisted that such immunities be "justified by overriding considerations of

public policy." *Forrester v. White*, 484 U.S. 219, 223-24 (1988). Accordingly, the Court's qualified immunity decisions strike a careful balance between the interest in immunizing official actions, and the countervailing interest in vindicating violations of federal rights in accordance with the statutory mandate of Section 1983.

The decision below disrupts this balance by ignoring the rationale behind this Court's qualified immunity decisions. Moreover, it offers no alternative rationale that would justify extending qualified immunity by placing restrictions on appellate review. Instead, the Ninth Circuit's ruling is based on a misinterpretation of this Court's opinion in *Davis v. Scherer*, 468 U.S. 183 (1984), and it produces results which are unjust and inconsistent with the qualified immunity decisions of this Court.

A. Making Qualified Immunity Dependent Upon The Legal Authorities Cited By The Parties Is Inconsistent With The Objective Legal Standard For Determining Whether Rights Are Clearly Established And Its Underlying Rationale.

The standard for qualified immunity has been precisely articulated by this Court: government officials are shielded from liability only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. The standard is deliberately based on an "'objective'" assessment of "the legal rules that were 'clearly established'" at the time of the challenged conduct. *Anderson v. Creighton*, 483 U.S. 635, 639, 641 (1987).

The Elder rule abandons this standard. The decision below changes the test from an assessment of the clarity of the actual legal rules to the clarity of the law "proffered by the plaintiff." JA 44-45, 50. Thus, the conduct is not evaluated based on whether government officials violated rights that were, in fact, clearly established, but on whether

they are clearly established under the artificial "universe of statutory or decisional law" cited by the plaintiff. JA 36.

This altered standard improperly transforms the *Harlow* standard "from a guarantee of immunity into a rule of pleading." *Anderson v. Creighton*, 483 U.S. at 639. Qualified immunity is concerned with determining when government officials should be held personally liable for violations of constitutional rights, and not with problems of pleading or proof. Consequently, in *Anderson*, the Court held that the standard should not be defined on such an abstract level that immunity can be defeated by the manner in which the violation of the plaintiff's rights is alleged after the fact. *Id.* at 640. For the same reason, the validity of an immunity claim should not depend on what legal authorities are identified in litigation after the alleged misconduct. The language in *Harlow* itself makes plain that the clarity of the law is not a matter of proof, but a matter for independent determination by the court:

> On summary judgment, *the judge appropriately may determine*, not only the currently applicable law, but *whether the law was clearly established* at the time the action occurred.

Harlow v. Fitzgerald, 457 U.S. at 818 (emphasis added).

Moreover, the Ninth Circuit's standard ignores the rationale behind qualified immunity. Qualified immunity is based on a balancing of "[t]he public interest in deterrence of unlawful conduct and in compensation of victims," *Id.* at 819, against the countervailing interest in not deterring public officials from executing their "office[s] with the decisiveness and the judgment required by the public good." *Scheurer v. Rhodes*, 416 U.S. 232, 240 (1974); *see also Forrester v. White*, 484 U.S. at 223; *Butz v. Economu*, 438 U.S. 478, 497 (1978). Thus, the goal of the *Harlow* standard is to define both those situations where official action should and should not be deterred. Where the law is not clearly defined, qualified immunity exists so that officials are not "induced to

act with an excess of caution or otherwise to skew their decisions." *Forrester v. White*, 484 U.S. at 223. On the other hand, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow*, 457 U.S. at 819. It is, therefore, central to the *Harlow* test to create an objective standard that permits government officials "'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. at 646 (quoting *Davis v. Scherer*, 468 U.S. at 195); *accord Mitchell v. Forsyth*, 472 U.S. at 524.

The Elder rule bears no relationship to this underlying rationale, and does not foster either of the interests served by qualified immunity. There is no way for government officials to anticipate whether the plaintiff's counsel and the district court will fail to identify the authorities showing that the official's conduct violated a clearly established right. Moreover, even if it were possible to anticipate when legal authorities would be overlooked, there would be no reason to encourage officials to conduct themselves based on such predictions. As Judge Kozinski's dissent noted, "*Harlow* doesn't say that 'officials should be made to hesitate' when plaintiff can cite a case that says they should." JA 53. Yet, the Elder rule misconstrues qualified immunity to establish just such an irrational test.

Thus, the rule does nothing to protect the ability of public officials to exercise their discretion where the law is uncertain. At the same time, it immunizes the conduct of officials that *do* violate clearly established rights and denies compensation to their victims on an essentially random basis. Regardless of the severity of the violation, the Elder rule forecloses the remedy created by Congress for violation of federal rights solely because of the failure of counsel or the district court to cite controlling legal authorities.

As a result, the Elder rule upsets "the balance that [this Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. at 195. In *Davis v Scherer*, the plaintiff sought a modification to the *Harlow* standard that would have permitted a plaintiff in a Section 1983 action to defeat qualified immunity by showing that the conduct violated clearly established state law, even if the violation of federal rights that formed the basis for the claim was not clearly established at the time of the conduct. This Court rejected such a rule because it would impose liability based on federal rights that were not clearly defined or foreshadowed at the time of the conduct and, thus, could not be anticipated by officials protected by the qualified immunity doctrine. *Id.* The Elder rule similarly disrupts the balance by allowing officials to escape liability based on subsequent events that cannot be anticipated. Moreover, the basis on which the Elder rule extends immunity, namely the failure of counsel to cite certain authorities in the district court, bears no relationship to whether there should be liability and compensation for the underlying conduct.[4]

The Elder rule also disrupts the balance adopted in *Harlow* by undermining the symmetry of its objective standard. The *Harlow* standard forecloses any inquiry into

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[4] Although the Ninth Circuit panel did not directly confront the issue, its prohibition on considering authorities not cited to the district court may apply to authorities that would support the defendant's qualified immunity defense. *See* JA 60, 64. If so, the rule would also disturb the balance struck in the *Harlow* standard by imposing liability on officials whose conduct did not violate any clearly established rights. Where a district court denies qualified immunity because legal authorities that demonstrate that the law is unclear are not cited to the district court, appellate courts will "be powerless to reverse the unjust imposition of liability on a government officer." JA 60.

whether the defendant took the action with the malicious intention to deprive the plaintiff of protected rights, because "[t]here are special costs to 'subjective' inquiries of this kind." 457 U.S. 815-16. The Elder rule, however, provides that the objective inquiry into whether the law is clearly established will be subjectively-defined by the legal research and selection of the relevant cases by plaintiff's counsel and the district court. JA 44. This subjective definition of the objective test creates perverse incentives for government counsel. Longstanding ethics rules require lawyers to inform the courts of controlling, adverse precedents that are not identified by their opponents. ABA Model Rules of Prof. Conduct, Rule 3.3(a)(3); ABA Model Code of Prof. Responsibility, DR 7-106(B)(1). The decision below, however, places a unique premium on not informing the court of such precedents by providing that, if the district court is unaware of the precedent, it cannot be considered on appeal. As a result, the Elder rule creates an incentive for government counsel *not* to pursue legal research on the obligations of his clients under existing law since such research might lead to the discovery of precedents that the government would be obligated to disclose in later litigation. *Cf.* JA 61 (rule encourages fraud on district courts). Thus, where *Harlow* mandated an objective standard that would provide an incentive for government counsel to see that officials are informed of their obligations under clearly established law, the Elder rule undermines the incentive to research those obligations by defining what is clearly established based on a subjective standard.

In addition to being inconsistent with the rationale behind qualified immunity, the Elder rule also fails to advance any other substantial public interest that would justify extending official immunity in Section 1983 actions. There is no compelling need to strengthen the already powerful incentives for parties to cite helpful authorities. Moreover, there is little logic in chastising blunders by counsel in legal research by denying recovery to claimants and immunizing official

misconduct. This Court has previously rejected the suggestion that an official who violates clearly established federal rights should be able to assert immunity based on the fortuitous error of a third party. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court rejected the claim that an official who violates clearly established rights, by applying for a warrant that a reasonable officer would know is not supported by probable cause, is entitled to absolute immunity if the magistrate also errs and issues the warrant. *Id.* at 345. In an "ideal system," unreasonable requests for warrants would never be approved, just as all relevant legal authorities would be identified during the district court proceedings. But, as recognized in *Malley*, "ours is not an ideal system." *Id.* Similarly, here, the failure of plaintiff's counsel and the district court to cite a particular authority does not provide a basis for affording immunity for conduct that violates clearly established federal law.

B. The Decision Below Misconstrues The Language of This Court's Decision In *Davis v. Scherer*.

From all this Court's decisions discussing qualified immunity, the Ninth Circuit latched on to a single sentence at the conclusion of the opinion in *Davis v. Scherer*, 468 U.S. 183, as the basis for its decision. From this Court's statement that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue," *id.* at 197, the Ninth Circuit concluded that the reference to making a "showing" means that plaintiffs have the burden of "identifying the universe of relevant statutory or decisional law from which the court can determine whether the right allegedly violated was clearly established," in the same way that plaintiffs bear the burden of placing relevant facts in the record. JA 39. Examination of the decision in *Davis*, however, demonstrates that the

Ninth Circuit has attributed to the word "showing" an elaborate meaning that was never intended.

First, the decision in *Davis v. Scherer* was not concerned with what authorities were to be considered in determining the legal issue in qualified immunity claims, much less with creating a special rule for appellate review. Rather, the issue presented in that case was whether qualified immunity is defeated where an official's conduct violates *any* clearly established legal duty, including a duty under state law -- or whether the clearly established right must be the federal right on which the cause of action is based. *Davis v. Scherer*, 468 U.S. at 193-96 & n.14. In holding that qualified immunity is overcome only if the right that gives rise to the cause of action is clearly established, this Court reaffirmed the objective standard announced in *Harlow*. *Id.* at 191. In that context, it is clear that the purpose of the closing sentence quoted by the Ninth Circuit is to emphasize that a plaintiff has the task of "showing that *those* rights" that are the basis for the cause of action -- and not some other rights -- "were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). Nothing in the opinion suggests that this Court intended to create a special rule governing the manner in which legal issues are to be determined in qualified immunity cases.

Second, in a footnote, the majority in *Davis v. Scherer* invoked the ordinary rule that appellate courts are presumed to be aware of and to apply their own precedents. *Id.* at 192 n.9 ("We see no reason to doubt . . . that the Court of Appeals . . . had full knowledge of its own precedents and correctly construed them.") This language belies the Ninth Circuit's claim that the *Davis* opinion supports its conclusion that appellate courts must *not* apply their own precedents if they were not cited in the district court.

Finally, *Davis v. Scherer* not only reaffirmed the objective standard in *Harlow*, but also held that engrafting exceptions that bear no relationship to its underlying rationale would

only "disrupt the balance" established in prior cases. *See supra* p. 26. That reasoning is equally applicable to the Elder rule, and underscores the extent to which the decision, by misconstruing a single word, distorts the analysis that should be applied in qualified immunity cases.

C. The Decision Below Compels Unjust Results.

The ultimate harm of restricting appellate review and extending qualified immunity based on the Elder rule is the injustice that it visits on civil rights plaintiffs. It is axiomatic that a just outcome presumptively requires applying the *correct* legal rule, not knowingly endorsing a decision based on an error of law. The decision below, however, requires that appellate courts affirm district court decisions that they know to be contrary to the controlling law. As a result, the decision mandates unfair results in three distinct ways.

1. The most blatant injustice of the Elder rule is that it requires appellate courts to affirm the dismissal of meritorious claims seeking compensation for violations of clearly established federal rights, based solely on the fortuity that the requisite legal authorities were not cited below. Such a denial of a compensatory remedy would be unfair in any context, but is particularly significant where it impairs the vindication of constitutional rights. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. at 814. Moreover, there is no just reason to create a rule that permits government officials to "discharge their duties in a way that . . . they should know transgresses a clearly established constitutional rule," and do so with impunity. *Butz v. Economu*, 438 U.S. at 507. Nonetheless, the Elder rule forecloses the remedy for such official misconduct on an arbitrary basis. The fact that the legal research during the district court proceedings was imperfect hardly justifies punishing the plaintiff by restricting appellate review in a way that requires dismissal

of the plaintiff's claim, no matter how meritorious. *See* JA 62-63.

2. The rule unjustifiably imposes an unique and unfair burden on civil rights plaintiffs. First, "no other litigant -- whether suing for an antitrust, tort, contract, or copyright violation -- risks forfeiture of his right to have the controlling law applied to his case simply because he neglects to cite the appropriate precedent in the district court." JA 65 (Reinhardt, dissenting). There is no principled reason for imposing a limitation on civil rights claims that exists in no other type of litigation. *Cf. Leatherman*, 113 S. Ct. at 1163.

Second, even assuming that the rule bars appellate consideration of uncited authorities whether they aid plaintiffs or defendants, defendants will be its primary beneficiaries. Under *Harlow*, the absence of legal authority is sufficient to sustain a qualified immunity defense, but a plaintiff can only prevail if the legal rules are clearly established. JA 40. Thus, plaintiffs are more likely to be victims of the rule where, as occurred in this case, the district court concludes that the decisions cited below are not sufficiently clear, and a more direct precedent is not considered until the appeal.

Finally, civil rights plaintiffs are also more likely than defendants to suffer from a rule that penalizes omissions in legal research. Many civil rights claimants must rely on small firms and solo practitioners, or proceed *pro se*. As a result, they are more likely to have limited resources for legal research, and to be vulnerable to missing relevant authorities because of the "logistical burdens of trial advocacy." *Salve Regina*, 111 S. Ct. at 1221. Defendants asserting qualified immunity, on the other hand, will usually be represented by government attorneys who not only have access to more extensive resources and personnel, but regularly litigate qualified immunity issues. The practical effect of the rule will be to require appellate courts to enhance the impact of the disproportionate resources between individual civil rights claimants and institutional defendants

by providing that an omission in legal research creates immunity for defendants who should be held liable under the governing law, without any countervailing benefit.

3. The rule also creates unfair outcomes by mandating that appellate courts treat civil rights plaintiffs with similar claims differently. "'[T]he principle of treating similarly situated [parties] the same,'" is a basic norm of adjudication. *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2516 (1993) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)). Yet, under the Elder rule, each qualified immunity case depends upon the legal authorities cited in that particular case, and not on any uniform rule of law. JA 43. Thus, claims that are indistinguishable on their facts may result in different outcomes because appellate courts are required to apply different legal standards. For example, if defendants in this action had arrested petitioner and another individual together in the house without first obtaining a warrant, and the second individual filed a separate Section 1983 action before a district judge who was aware of the *Al-Azzawy* precedent, the second plaintiff might be able to defeat qualified immunity, even though the official misconduct was identical to that which the court held was immune in this case. Indeed, if the district judge in the second action entered summary judgment despite being aware of the *Al-Azzawy* decision, on appeal the appellate court might be required to affirm dismissal of petitioner's action and to reverse the identical ruling in the second case, based solely on the differences in the authorities considered by the two district judges.

Thus, the Elder rule deliberately thwarts the rule of law by mandating that a legal rule could "be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow." *Town of South Ottawa v. Perkins*, 94 U.S. at 267. Permitting the substantive law to "shift and spring" in this manner, so that similar cases are governed by different rules,

is fundamentally unfair and constitutionally suspect. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2447 (1991) (opinion of Souter, J.); *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938) (pre-*Erie* doctrine of applying "general law" in federal court, while state courts applied state law, rendered equal protection of the law impossible). Institutionalizing such inequity by mandating affirmance of known legal errors, as the Elder rule does, is plainly improper.

CONCLUSION

The Ninth Circuit's decision should be reversed.

Respectfully submitted,

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